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No. 85-131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GEORGIA J. LEWIS,
Petitioner,

v.

F. MAX BLACKBURN, Clerk, Superior Court, Mecklenburg County, and FRANK W. SNEPP, JR., Senior Resident Superior Court Judge, Mecklenburg County, North Carolina,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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12 pp

QUESTIONS PRESENTED

I. ARE THE CLERICAL DUTIES AND WORKLOAD OF A MAGISTRATE MATTERS OF "PUBLIC CONCERN" WITHIN THE MEANING OF THE FIRST AMENDMENT?

II. SHOULD THIS COURT RE-EXAMINE THE FIRST AMENDMENT RIGHT OF PETITIONER?

III. DID THE COURT OF APPEALS VIOLATE RULE 52(a), FED. R. CIV. P.?

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OPINIONS BELOW

The opinion of the United States Court of Appeals, *en banc*, in this case (not yet reported), the opinion of the majority of the three judge panel, 734 F.2d 1000, and the dissent to the majority opinion, 734 F.2d 1008, are set forth in the petitioner's Appendix beginning at page 1.

JURISDICTION

The jurisdiction of this Court has been invoked by petitioner pursuant to 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions are set forth in petitioner's Appendix, pp. 219–222.

STATEMENT OF THE CASE

Petitioner Georgia J. Lewis was serving as a magistrate in Mecklenburg County, North Carolina, for a two-year term expiring December 31, 1982. In North Carolina, magistrates are nominated by the Clerk of Superior Court and appointed by the senior resident Superior Court judge from the nominees selected by the Clerk.

In September 1982, respondent R. Max Blackburn, Clerk of Superior Court in Mecklenburg County, notified petitioner that he did not intend to renominate her as a magistrate. She instituted this action against Blackburn as original defendant under 42 U.S.C. § 1983. She alleged that Blackburn was violating her constitutional rights, that he was refusing to renominate her on account of her speech protected under the First Amendment. The case was assigned to the Honorable James B. McMillan. After two hearings, the District Court entered judgment in petitioner's favor, and ordered Blackburn to write a letter to Judge Frank W. Snepp, Jr., senior resident Superior Court judge for Mecklenburg County, stating that the nomination was "for real" and that Blackburn was "dead serious" in making the nomination. The District Court also found Blackburn liable for costs and attorneys fees.

Blackburn complied with the District Court's order, renominated petitioner and another individual for another two-year term as magistrate, and wrote the required letter to Judge Snepp.

On December 28, 1982, Judge Snepp appointed the other individual to petitioner's position as magistrate, and wrote Blackburn a letter explaining his reasons. Petitioner moved for an order making Judge Snepp an additional party defendant, which motion was allowed by the District Court. The District Court further prohibited Blackburn from swearing in the individual appointed by Judge Snepp as magistrate.

After a hearing conducted on January 10, 1983, the District Court entered final judgment on January 13, 1983. The Court found that Judge Snepp had also violated petitioner's First Amendment rights, and ordered him to immediately reappoint petitioner to another term as magistrate.

Blackburn and Snepp gave notice of appeal to the Court of Appeals and Judge Snepp moved the District Court for a stay of its order pending appeal, which was denied. Snepp then petitioned the Court of Appeals for a stay pending appeal which was allowed.

On appeal, the District Court judgment was affirmed by a 2 to 1 decision, *Lewis v. Blackburn,* 734 F.2d 1000 (C.A. 4, 1984). Ervin, J., dissented. 734 F.2d 1008. Rehearing En Banc was allowed and the En Banc Court reversed the District Court judgment. Petitioner's Appendix 1.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE CLERICAL DUTIES AND WORKLOAD OF A MAGISTRATE ARE NOT MATTERS OF PUBLIC CONCERN WITHIN THE MEANING OF THE FIRST AMENDMENT.

Petitioner asks this Court to "settle the analytic framework to be applied" in determining "whether speech

addresses a matter of public conern." Petition, p. 7. In the respondents' view, this question has been settled by this Court.

> Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement as revealed by the whole record.

Connick v. Myers, 461 U.S. 138, 75 L. Ed. 2d 708, 720 (1985).

The dissenting opinion of Ervin, J., which was the basis of the En Banc decision, enunciates the position of the respondents:

> Here, it is beyond dispute that Lewis's complaints began upon learning that she would be assigned additional duties. The record as I view it is unequivocal that the motivation for her complaints was personal effrontery over being asked to do more work, not public-spirited concern over the administration of justice.

Appellant's Appendix, pp. 48-49.

> The seeds of this unseemly controversy can be discovered in Lewis's own deposition in which she admitted that she was not initially aware that Magistrates did their own typing and microfilming of documents. She learned this in the course of her training although she candidly admitted that "I don't like to microfilm."

Appellant's Appendix, p. 50.

> As further evidence that Lewis was interested only in her own personal work load, her testimony reveals that in her opinion the additional

> microfilming required an additional one-half to one hour per day of her time, although she admitted that this was not true "every day." Her displeasure centered on her own overtime work and her inability to leave the office at 5:00 p.m.

Appellant's Appendix, pp. 52–53.

> In short, I think that the sum and substance of Georgia Lewis's complaint was that she had too much work to do and could not absorb additional duties. While I am sympathetic to her grievance, I find in her protest only matters of self-interest rather than issues of public concern.

Appellant's Appendix, p. 57.

II.

THIS COURT SHOULD NOT RE-EXAMINE THE RIGHT TO PETITION GUARANTEED BY THE FIRST AMENDMENT.

It is true as stated in the Petition, p. 22, that the District Court found as a fact the petitioner was not renominated or reappointed a magistrate because she "protested the additional duties", Petitioner's App. 93, and because of her "speaking out to her supervisor . . . and others", Petitioner's App. 103–104. However, the trial court's decision, Judge Ervin's dissent, and the En Banc decision are based primarily on the constitutional right of *free speech,* not the right to petition the government for a redress of grievances. Judge Ervin clearly recognized the right of petitioner to petition the court. Petitioner's App. 58.

This appeal is not an appropriate vehicle for this Court to re-examine the right to petition guaranteed by the First Amendment. A careful review of Rule 17, Considerations Governing Review on Certiorari, indicates no basis to allow this petition. The petitioner is asking this Court to agree to decide whether the right to petition is absolute. Pet. 25. This is a legal theory new to this case, not briefed or argued below. It is thus inappropriate to be considered here for the first time, since the decision below was based on another constitutional ground.

III.

THE COURT OF APPEALS DID NOT VIOLATE RULE 52(a), *FED. R. CIV. P.*

The Court of Appeals held:

> We hold that the district court erred as a matter of law in finding that Georgia Lewis was not reappointed because she protested matters of public concern rather than matters of her immediate self-interest, within the meaning of the Supreme Court's ruling in *Connick v. Myers,* 461 U.S. 138 (1983).

Petitioner's Appendix, pp. 2–3.

The finding of fact by the trial court in question was:

> [H]e declined to reappoint Ms. Lewis because she had exercised her rights under the First Amendment to the United States Constitution by speaking out, to her supervisor Judge Saunders and to Judge Snepp and others, in opposition to the defendant Blackburn's order regarding microfilm copies of case files.

Petitioner's Appendix, pp. 103–104.

This finding of fact was rejected by the Court of Appeals by adopting the following from Judge Ervin's dissent to the original panel opinion:

> The crux of the matter, then, is whether Lewis's complaints regarding the microfilming assignment could lawfully provide the basis for her non-reappointment.

Petitioner's Appendix, p. 43.

> Here, it is beyond dispute that Lewis's complaints began upon learning that she would be assigned additional duties. The record as I view it is unequivocal that the motivation for her complaints was personal effrontery over being asked to do more work, not public-spirited concern over the administration of justice.

Petitioner's Appendix, pp. 48-49.

See quotes from Petitioner's Appendix, pp. 50, 52-53 and 57 under Argument I above.

Recently this Court had occasion to consider the application of Rule 52(a) with respect to what is meant by "clearly erroneous":

> Although the meaning of the phrase "clearly erroneous" is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles, as the Fourth Circuit itself recognized, is that "*a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.*" *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

53 USLW 4317 (emphasis added).

It is the contention of the respondents that the whole record fails to support the trial court's conclusion that petitioner was not reappointed a magistrate because she spoke out on matters of *public* concern.

In *Anderson v. City of Bessemer,* ____ U.S. ____, 53 U.S.L.W. 4314 (1985), the District Court's finding was based on "essentially undisputed evidence", p. 4317. Here, the evidence is clearly in dispute as to the motivation for the non-reappointment of petitioner as a magistrate.

> [W]e reaffirm the principle that, in "obscenity" cases as in all other involving rights derived from the First Amendment guarantees of free expression, *this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected.*

Jacobellis v. Ohio, 378 U.S. 184, 190 (1963) (emphasis added).

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied with all costs assessed against petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served three copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari upon the persons indicated below by depositing same in the United States mail, first-class postage prepaid, addressed to the following:

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This the 13th day of September, 1985.

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